Nos. 89-388, 403, 552

In the

Supreme Court of the United States

OCTOBER TERM, 1989

THE CITY OF NEW YORK, *et al.*,
Petitioners,

vs.

SEAWALL ASSOCIATES, *et al.*,
Respondents.

RICHARD WILKERSON, *et al.*,
Petitioners,

vs.

SEAWALL ASSOCIATES, *et al.*,
Respondents.

THE COALITION FOR THE HOMELESS,
Petitioner,

vs.

SEAWALL ASSOCIATES, *et al.*,
Respondents.

Brief for Respondents 459 West 43rd Street Corp., Eastern Pork Products Company and Durst Partners in Opposition to Petitions for a Writ of Certiorari to the New York Court of Appeals

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PHILIP H. SCHAEFFER
Counsel of Record
WHITE & CASE
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8200

JANE D. CONNOLLY
JOHN S. WILLEMS
Of Counsel

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Question Presented for Review

If this Court grants the writs of certiorari sought, the following question will be presented for review.

Is Local Law No. 9 of the Laws of The City of New York, 1987 ("Local Law No. 9") unenforceable as a taking of private property without just compensation in violation of the Constitutions of the United States and of the State of New York to the extent that it mandates owners of buildings containing single room occupancy dwelling units to rehabilitate and rent for an indefinite future period all present and future vacant units within thirty days at governmentally controlled rents unless the owner pays $45,000 to the City of New York for each such SRO unit it wishes to keep vacant or builds alternative units and delivers them without profit or gain to governmentally designated entities or persons, on the ground that Local Law No. 9:

(a) is a per se violation of the takings clause because it denies the owners "the right to exclude others" from their properties in violation of the principles stated in *Hodel* v. *Irving*, 481 U.S. 704 (1987) and *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), or

(b) otherwise violates "[o]ne of the principal purposes of the Takings Clause [which] is to 'bar Government from forcing some people alone to bear public burdens which in all fairness and justice should be borne by the public as to whole.' " *Nollan* v. *California Coastal Commission*, 483 U.S. at 835, n.4 (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960))?

List of Parties

(a) Parties

The parties to the appeal before the Court of Appeals of the State of New York which resulted in the order which is the subject of the petitions for certiorari are: The City of

New York, Edward I. Koch, in his capacity as Mayor of the City of New York, Paul A. Crotty, in his capacity as Commissioner of the Department of Housing Preservation and Development of the City of New York, Charles Smith, in his capacity as Commissioner of the Department of Buildings of the City of New York, Richard Wilkerson, Edgar Ferrell, Frank Alicia, Tom Williams, Danny Sogliuzzo, Nicholas Tallerico and The Coalition for the Homeless, Seawall Associates, 459 West 43rd Street Corp., Eastern Pork Products Company, Durst Partners, Sutton East Associates-86, The Channel Club, Anbe Realty Co., Jambod Enterprises, Inc., Mygatt/Perry, Felix Ziade, Rocco Imperial and Testamentum.

(b) Statement Pursuant to Rule 28.1 of the Rules of this Court

459 West 43rd Street Corp. is a corporation incorporated under the laws of the State of New York. The shares of 459 West 43rd Street Corp. are not publicly traded and are solely owned by members of the family of the deceased Joseph Durst ("the Durst family"). 459 West 43rd Street Corp. has no affiliates whose shares are not also held entirely by the Durst family and it has no subsidiaries. Eastern Pork Products Company and Durst Partners are both partnerships organized under the laws of the State of New York, the interests in which are entirely owned by members of the Durst family.

Jambod Enterprises, Inc., Mygatt/Perry, Felix Ziade and Rocco Imperial were also represented by the attorneys for 459 West 43rd Street Corp., Eastern Pork Products Company and Durst Partners before the Court of Appeals of the State of New York but will not participate in the proceedings before this Court. Jambod Enterprises, Inc., is a corporation incorporated under the laws of the State of New York. To the best of our knowledge and information, it has no subsidiaries, parent companies or affiliates. Mygatt/Perry is a partnership organized under the laws of the State of New York engaged in the practice of architecture.

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Introductory Statement

This brief opposes the petitions for a writ of certiorari submitted on behalf of the City of New York, its Mayor, Commissioner of the Department of Housing Preservation and Development, and Commissioner of the Department of Buildings ("the Municipal petition"), The Coalition for the Homeless ("the Coalition petition") and Richard

Wilkerson, Edgar Ferrell, Frank Alicia, Tom Williams, Danny Sogliuzzo and Nicholas Talerico ("the MFY petition").

The parties on whose behalf this brief is submitted are 459 West 43rd Street Corp. ("459"), Eastern Pork Products Company ("Eastern") and Durst Partners ("Partners"). The matter which is the subject of the petitions and this brief in opposition is *Seawall Associates* v. *City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542, 542 N.E.2d 1059 (1989).

Statutes Involved

Local Law No. 9 appears at R 151 *et seq.*[1]

Local Law No. 9 was enacted by the City Council of the City of New York on March 5, 1987. That ordinance established restrictions on certain owners of buildings in New York City which contained single room occupancy units. "Single occupancy units" ("SROs") are dwelling units which lack kitchens, bathrooms or both within the unit. The SRO units which are the subject of these restrictions do not include the thousands of such units owned by New York City or by various not-for-profit institutions. Generally, the limitations are only upon those units which are owned by private (*i.e.*, nongovernmental) citizens.

Local Law No. 9 declared it to be both illegal and a criminal act to demolish, alter or convert an SRO unit for a minimum five-year period, with provision for unlimited extensions of that moratorium for additional five-year periods. Under the terms of Local Law No. 9, all SRO units must be rented to tenants within 30 days. All SRO units which are presently vacant must be rehabilitated and made habitable. These too must be rented within 30 days.

[1] References preceded by "R" and "SR" are to the Record and Supplemental Record before the New York Court of Appeals.

All such rentals of SRO units are to be governed by the rent control and stabilization laws applicable in New York City. These laws limit the amounts of rent that can be charged and give each particular tenant the right to continue in possession of the unit indefinitely, without regard to the five-year period of the moratorium or any extension thereof. Failure or refusal of the owner to perform any of the foregoing is punishable by the imposition of substantial fines and criminal prosecution. The civil fines to be imposed are $500 per SRO unit, commencing ten days after service of a notice of the violation, which penalty continues to accrue on a daily basis until cured. Local Law No. 9 presumes that if a SRO unit remains vacant for 30 days, the owner has violated the law.

If an owner of SRO units desires to use his or her property in any manner other than for SRO units, he or she must pay the City no less than $45,000 per SRO unit to be freed from the restrictions of Local Law No. 9. Under certain circumstances, the owner may alternatively construct new residential units or buildings in lieu thereof and immediately turn them over to a not-for-profit entity approved by the City. In either event, the owners must relocate their SRO tenants if the tenant is willing to be relocated or if the tenant's consent can be purchased by the owner at whatever price the tenant demands.

Statement of the Case

Eastern, 459 and Partners ("the Durst respondents") are each engaged in the business of acquiring real estate for development and sale. Each Durst respondent owns a building in Manhattan which contains SRO units. 459 owns a building known as the Hotel Diplomat located at 108 West 43rd Street. That property was acquired by an affiliate of the Durst family in 1970. At the time of its acquisition, it was operated as a residential hotel containing 216 units. It continues to be so operated. Of the 216

SRO units in the Hotel Diplomat, (a) 48 units are occupied by tenants covered by New York City's rent stabilization law, (b) two units are occupied by tenants covered by New York City's rent control law, (c) 56 units are occasionally let for transient use and (d) 110 units have long been vacant, uninhabitable and each would cost tens of thousands of dollars per unit to rehabilitate.

In 1986, Eastern purchased real property at 611 Ninth Avenue. Situated thereon is a three-story building which at the time of its acquisition was operated, and continues to be operated, as a multiple dwelling containing 18 SRO units. Eight such units are occupied by tenants protected by New York City's rent stabilization and rent control laws. The remaining ten units are vacant and uninhabitable.

Partners owns property at 147-151 West 43rd Street. The six-story building was acquired more than ten years ago and is entirely vacant.

Each of the foregoing properties was acquired for investment purposes before the enactment of Local Law No. 9. After analyzing the costs of rehabilitation, the likely rents to be earned in the event of the mandatory renovation, the "rent-up" and expenses of operation, it is estimated that the losses to the owners of the Hotel Diplomat would exceed $754,486 a year. (SR 251-258). With respect to all of the presently vacant units, 611 Ninth Avenue would likewise lose $61,994 annually on the units which would be the subject of the mandatory renovation and rent-up under Local Law No. 9 (SR 117, 258-261).

The history of SRO housing in New York City and its decline in numbers—a decline previously encouraged by all those who were interested in decent housing—is narrated in the City's own report, which was undisputedly the basis for Local Law No. 9. That report, prepared by Anthony J. Blackburn for the City in 1986, and entitled *Single Room*

Occupancy in New York City ("the Blackburn Report"),[2] states:

> [P]ublic policy has been consistently hostile to single-room occupancy arrangements for almost half a century.
>
> There have been several reasons for the efforts to curb the growth of single-room occupancies. First and foremost is the long-standing commitment of the housing and city planning profession to upgrade the housing stock through restraint on the development of "substandard" housing. The lack of full plumbing facilities within a dwelling unit has always been a key measure of substandardness in housing. Absence of cooking facilities and very small unit sizes also detract from the "quality" of the housing stock as traditionally defined. For very respectable reasons based on the long-standing commitment to the elimination of substandard housing, public policy has traditionally tried to control, and occasionally eliminate, single-room occupancy housing . . . .
>
> The sordid conditions of many of the buildings, the outrage of local residents at finding themselves next door to concentrations of social misfits, and the commitment of the housing professionals to standard housing as a matter of principle evoked a forcible reaction from Judah Gribetz, an aide to Mayor Wagner . . . he railed against the SROs:
>
> "The SRO should not be accepted as lawful housing for any segment of our citizenry. No community should equate such housing with the acceptable living standards of the 1960s. We should

[2] The Blackburn Report is part of the Record on Appeal before the New York Court of Appeals (R 673-808). Citations to the Blackburn Report will be made to the pages of that Record.

> seriously consider the possibility of phasing the SRO out of existence by compelling its restoration to apartment use. . . . The SRO is a vestigial remnant of a past generation. Its history and use demonstrate that the time has come for the SRO to be regarded as extinct."
>
> These sentiments found legislative expression in amendments to the Housing Maintenance Code which effectively prohibited further conversion to rooming units and . . . discourage[d] subdivision of buildings into rooming units.[3]

The Blackburn Report credits the City for the decline in SRO housing:

> [T]he City's policy in the 1960s to retire the inventory of single room housing . . . was conspicuously successful. Since no new rooming units could be legally created, it was inevitable that the legal inventory would decline through conversion and abandonment.[4]

The recent decisions of City officials to safeguard single room occupancy housing in New York City are a testament to the indifference of that government to those who would dwell therein. They are also a testament to the local government's determination to avoid the political opprobrium associated with a general tax increase needed to help the impoverished. Justice Holmes has written "that a government ought not to be called 'civilized' if it sacrifices the citizen more than it can help."[5] Under that test, the government that created Local Law No. 9 is uncivilized, both by reason of its failure to serve the poor as well as its

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[3] R 685-687.

[4] R 688.

[5] O.W. Holmes, *The Common Law*, at 37 (M. Howe ed., 1963).

effort to shift the burdens of housing the impoverished on to the respondents' shoulders.

Local Law No. 9 does not merely regulate relations between tenants and landlords, as do rent control and rent stabilization laws. *Bowles* v. *Willingham*, 321 U.S. 503 (1944). It also requires owners of SRO units to pay the City for the right to make free use of their properties. It requires owners of buildings containing SRO units to (a) "rent up" any vacant units they may possess ("the rent-up" or "anti-warehousing provisions"); (b) rehabilitate or repair such vacant units; and (c) if the property owner desires to leave the SRO business, or use his property in any other manner whatsoever, he or she must either pay to the City of New York $45,000 per unit or provide for construction of new dwelling units in lieu thereof. Local Law No. 9 is thus fundamentally different from laws which merely seek to regulate rents or even to make indefinite the terms of residential tenancies.

The effect of the foregoing, particularly the "buy-out" or replacement provisions of Local Law No. 9, is to conscript the owners' properties for use as the City Council wishes, and, in addition, to compel the owners to engage in the SRO business for as long as the City Council so pleases.[6]

If those of the Durst respondents who own the Hotel Diplomat, a large property situated on West 43rd Street, wished to make economic use of this site, whether for residential or office use, they would have to pay the City at least the sum of $45,000 per unit for each of 216 units, or replace those units in other locations at what is presumably a similar cost. The total amount due from such respondents would be $9,720,000. If the entire vacant stock of privately owned SRO units in the City (5,200 to 7,000 units) were to

[6] Section 7 of Local Law No. 9 provides that it is effective for five years and will continue to be effective for additional five-year periods thereafter if the City Council so extends it.

be so "ransomed" by their owners at the $45,000 per SRO unit "buy-out" price, the City would realize for itself the tidy sum of $315,000,000![7]

The paying of such enormous sums to the City would still not supply owners with the key to their freedom. They must obtain possession of their units from the occupants thereof. With respect to the Hotel Diplomat, the Durst respondents would still have to buy out each of the 50 occupants who remain at the hotel, as well as the 166 occupants who would either replace the transient guests in the hotel or fill vacant rooms as a consequence of the mandated "rent-up." These requirements of Local Law No. 9 destroy any possibility of using the Hotel Diplomat in the future as anything other than an SRO hotel.

The Blackburn Report made it clear that City policy should favor requiring the owners of SRO units to so purchase their freedom. With admirable candor, Blackburn wrote:

> The only way to secure the long-term availability of single room occupancy housing for low-income persons is to transfer the ownership of those properties from for-profit to non-profit entities and to establish the purposes for which they can be used by deed restrictions or similar devices. . . .
>
> * * *

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[7] Contrast this cumulative cost of "buy-out" with the current financial plight of the SRO owners as described in the Blackburn Report:

> The previous owners of single room buildings generally express the view that this form of housing is uneconomic, particularly in the light of rent regulation and the typically low income of tenants. Many of them left the business because of frustrations dealing with tenants who frequently had emotional and psychological problems, were in arrears with the rent and were difficult to evict for nonpayment or general property abuse.

R 708.

> This can only be accomplished by both allowing buildings to be converted to more profitable use at a price which more than adequately compensates the city for the resulting loss of low-income units and/or by transferring ownership to non-profit entities which will operate the properties for the benefit of poor single persons.[8]

Local Law No. 9 is not truly directed at the problems created by the decline in numbers of SRO units. As we have seen, no civilized government official in modern history has ever wished to permit development of such substandard accommodations. The actual problem is the shortage of low and moderate income housing in the City of New York. Local Law No. 9 is intended to extract from the SRO owners substantial cash contributions to build or maintain housing units which hopefully will be affordable to citizens of modest means.

The reality is that Local Law No. 9 places a unique burden on only a small fraction of those owners whose properties are usable as lower income housing units. That burden is placed on them solely because their properties contain what are classified as "single room occupancy dwelling units." The far more numerous owners of properties which are also appropriate for use as "dwelling units for persons of modest incomes," however, are free to develop their properties without restriction. That freedom is the consequence of their having fortuitously not fallen within the SRO classification.

An irony of the situation is that the City of New York is the owner of the greatest number of vacant multiple dwellings in the City, including those containing SRO units. Yet, it has exempted itself from the requirements of Local Law No. 9. In the City's view, what is sauce for the unfortunate privately-owned goose is *not* sauce for the municipally-owned gander.

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[8] R 734, 737.

REASONS FOR DENYING THE WRITS

Introduction

The questions sought to be presented to this Court by the Municipal, Coalition and MFY petitions do not qualify under the rigorous standards of Rule 17.1 for review by this Court. The provisions of Local Law No. 9 are so unusually overreaching that review by this Court thereof would require devotion of substantial judicial and legal energies to consideration of what will ultimately prove to be episodic and fleeting. No other jurisdiction is likely to ever enact such oppressive restrictions on property use. Moreover, the rigorous features of Local Law No. 9 about which the respondents complain and which the New York Court of Appeals found abhorrent are, in major part, a function of the unique nature of New York's particular landlord-tenant and land use laws, not sufficiently national in interest to merit review by this Court.

Two more reasons exist for denying the petitions. The petitioners do not really argue that the highest court of New York State invented or misconceived the constitutional principles on which it based its decision. As we shall see, the Municipal, Coalition and MFY petitions merely contend that those previously enunciated principles were misapplied, a conventional argument invariably asserted by unsuccessful litigants and their counsel.

Finally, even cursory review of the petitions and the case below indicates that, contrary to the assertions of petitioners, the decision which is the subject of these applications was properly decided. It is the petitioners who misstate previous decisions of this Court and are in error, not the highest court of the State of New York which ruled against petitioners.

Before proceeding to the merits of the matter, we wish to take a moment to deplore the unseemly mischaracterizations made in the Coalition and MFY petitions, mischaracterizations which are particularly surprising in view of the

eminence of the advocates whose names appear on the petitions in question. It does little credit to its arguments for the Coalition petition to deprecate respondents as builders of "luxury housing" (Coalition Pet. at 9), suggest (contrary to everything in the record) that respondents have been in any way guilty of "harassment" of others (*id.*) or that they are collectively "a group of real estate developers" (Coalition Pet. at 7), as if respondents were less entitled to constitutional protection for that reason. Even more egregious is the MFY petition which inaccurately and impermissibly calls respondents "commercial real estate developers who wished to demolish or convert their buildings to luxury offices or residences" (MFY Pet. at 5-6), dismisses respondents as mere seekers after "speculative gain" (MFY Pet. at 8) and again falsely suggests that both the Court of Appeals and respondents ignore the rights of poorer citizens "driven out of their homes by absentee corporate owners of multiple dwellings who sought financial gain without considering its human costs" (MFY Pet. at 9).

Such mischaracterizations are inappropriate and reflect badly on the arguments made by those who see fit to pepper their petitions with such offensive materials.

I

The unique nature of both Local Law No. 9 and New York law of land use make this an inappropriate case for review by this Court.

The appeals which the petitioners seek to bring to this Court do not meet the criteria of Rule 17.1 on at least two grounds. First, Local Law No. 9 is so uniquely restrictive and extreme, and is recognized to be so restrictive by the petitioners themselves, that it is doubtful that any other jurisdiction will adopt such laws. "[T]he problem, though intrinsically important . . . [is not] . . . 'beyond the academic or the episodic.'" R. Stern, *Supreme Court Practice*

212 (6th ed. 1986) (quoting *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955)).

Each of the petitions for certiorari emphasizes in its "Questions Presented," as well as in the body of its arguments for review, that Local Law No. 9 is "emergency" and "temporary" legislation. Each thereby concedes the constitutional dubiousness of such a conscription of property owners into operating such a business under such constraints in ordinary circumstances (Municipal Pet. at 3, 21-22; Coalition Pet. at 6, 31-37; MFY Pet. at 4, 7). By so conceding that Local Law No. 9 is only justifiable as "emergency" or "temporary" legislation, petitioners implicitly admit that it can only be justified if it is seen as transitory. Permanent legislation with provisions such as those of Local Law No. 9 would apparently be unjustifiable, even adopting the views of the petitioners. Why after the highest court of New York has ruled on such ephemeral legislation, devoting substantial judicial energy thereto, should the matter not be allowed to rest? Certainly, this Court should not now devote its scarce resources to further review of such a matter. Enough judicial time has been devoted to resolution of an issue which "though intrinsically important" is also admittedly "episodic." R. Stern, *supra*, at 212.

Furthermore, the decision of the New York Court of Appeals invalidating Local Law No. 9 is based on the peculiarities of New York law. There is little reason for this Court to wrestle with a municipal ordinance, the effect of which is so intertwined with local issues of law and policy.

A basic assumption of the decision of the Court of Appeals in holding Local Law No. 9 to be unconstitutionally oppressive was that under New York law, "development rights" (*i.e.*, the right to erect substantial structures by assembling parcels of land) occupy a key place in the bundle of rights which constitute ownership of real property. Citing its own particular decisions to that effect, the Court of Appeals at 74 N.Y.2d at 109, 544 N.Y.S.2d at 550, 542 N.E.2d

at 1067, found that Local Law No. 9 "totally abrogated" such development rights and that under New York law such rights:

> "are an essential component of the value of the underlying property" and that "they are a potentially valuable and even a transferable commodity and may not be disregarded in determining whether the ordinance has destroyed the economic value of the underlying property."

(quoting *Fred W. French Investment Company* v. *City of New York*, 39 N.Y.2d 587, 597, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976), *cert. denied* and *app. dism.*, 429 U.S. 990 (1976); and citing *Matter of Keystone Associates* v. *Moerdler*, 19 N.Y.2d 78, 278 N.Y.S.2d 185, 224 N.E.2d 700 (1967) and *Foster* v. *Scott*, 136 N.Y. 577, 32 N.E. 976 (1893)).

Few, if any, other jurisdictions so prize "development rights" as does New York, which refuses to permit their being disregarded in analyzing the constitutional propriety of local legislation as either a violation of constitutional due process or a wrongful taking. If this Court were to grant certiorari and review all or any of the questions raised in the petitions, it would be necessary, as part of the Court's review, to undertake an analysis of the New York law of development rights and the degree to which it assigns peculiar significance thereto in evaluating the property rights of owners of New York property. Such an analysis is hardly a matter of national interest.

Similarly, the draconian effect of Local Law No. 9 upon the unfortunate property owners who fall within its grasp cannot be understood without reference to the parochial New York laws of rent control and rent stabilization as well as the "temporary emergency" which has justified their continuation for the last half century.[9] It is that strait-

[9] *Benson* v. *Beame*, 50 N.Y.2d 994, 431 N.Y.S.2d 475, 409 N.E.2d 948 (1980), *app. dism.*, 449 U.S. 1119 (1981).

jacketing of rents, unique to New York, and the pretext that such restrictions will only continue until the alleged "emergency" is over, which effectively sentences owners of SRO properties under Local Law No. 9 to a lifetime occupation which they do not wish to undertake and which they cannot avoid in the absence of paying ransom for their properties or abandonment.

In summary, the decision of the New York Court of Appeals setting aside Local Law No. 9 is one which is both profoundly based on local conditions in New York itself and the remarkable features of that ordinance. In either case, it does not present an appropriate occasion for this Court to address the developing law of takings.

Given the details and unusual nature of Local Law No. 9, it may well be that in the efforts to obtain review, its invalidation should be considered along with the caveat that "hard cases often make bad law"—yet a further reason for denying the petitions for certiorari. This Court has often denied certiorari on the theory that definitive decisions on a developing area of law should "await the perspective of time," R. Stern, *supra*, at 214, or the work product of other courts. Such restraint is highly appropriate in dealing with such remarkably constraining legislation as Local Law No. 9. This is particularly so since that Local Law was challenged on grounds that it constitutes an impermissible "taking," an area of constitutional jurisprudence that itself is still developing. *See* "The Jurisprudence of Takings," 88 Colum. L. Rev. 1581 through 1794 (1988).

II

The petitions for certiorari merely argue that there has been a misapplication of principles established by this Court; such an argument is insufficient reason to grant review and, in any event, there has been no such misapplication presented.

R. Stern, *supra,* writes at page 203:

> Lawyers, however, are likely to regard any case that they have lost in a lower court as necessarily in conflict with some Supreme Court decision or doctrine; that is what makes the ruling below arguably "erroneous." But such a loose reading of the Rule 17.1(c) reference to a decision "in conflict with applicable decisions of this Court" does not satisfy the Court's own understanding of what constitutes a conflict of this nature. To justify a grant of certiorari, the conflict must be truly direct and must be readily apparent from the lower court's rationale or result.

Examination of the petitions confirms that the substance of each petitioner's argument is that, in one way or another, the New York Court of Appeals failed to apply this Court's "takings" opinions as petitioners would like to see those opinions applied and also failed to understand the provisions of Local Law No. 9. For example, the Coalition petition states at pages 30-31:

> The court below failed to analyze properly the character of Local Law 9, and it held erroneously that its mere enactment constitutes a regulatory taking because it denies the owners economically viable use of their properties, and does not substantially advance a governmental interest. In reaching such conclusion, the court misread prior decisions of this Court.

The Coalition petition does not contend that the principles of what constitutes a regulatory taking were ignored or erroneously restated by the Court of Appeals, only that they were erroneously applied. The same contentions are made by the Municipal petition. *See, e.g.*, Municipal Pet. at 8, 17.

Ironically, it is petitioners who misapply the principles already established by this Court in "takings" cases in their specious effort to persuade this Court that the decision sought to be reviewed is erroneous.

For example, the Municipal petition at page 13 inaccurately states that, because Local Law No. 9 purports to be a "temporary emergency" measure, it cannot be a "physical taking," describing as "unwarranted" this "expansion" of the holding in *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304 (1987). Presumably, the Municipal petition concedes that there can be a "temporary regulatory taking" after *First English*. No doubt the latter is true; however, the constitutional infirmity of uncompensated-for "temporary physical takings" long predates, and indeed was a basis for, the *First English* decision. *See First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. at 317-18, citing and discussing as examples of "temporary physical takings," compensable under the Fifth Amendment, *United States* v. *Dow*, 357 U.S. 17 (1958), *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949); *United States* v. *Petty Motor Co.*, 327 U.S. 372 (1946); *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945).

The petitions also overlook the gravamen of the constitutional infirmities found by the New York Court of Appeals. Local Law No. 9 singles out a small class of real property owners to meet a particular burden of solving a social problem that is not necessarily related to any problem caused by those owners. Those real property owners are deprived of all development rights to their property, required to spend unanticipated sums to rehabilitate those properties,

and rent them up to tenants who will obtain rights of indefinite duration at limited rents under New York's rent stabilization and control laws. No showing is made that the particular persons who will become occupants of this SRO housing so created by Local Law No. 9 are the class of persons intended to be assisted (*i.e.*, the homeless).[10] Nor are owners of other properties which could be used for solution of these social problems affected; only those who happen to own buildings with SRO units are required to participate in the rehabilitation and rent-up of their buildings and to continue doing so in the future. Owners of other structures equally amenable to low income occupants are unaffected by the ordinance even though there are no doubt hundreds of thousands of such units. In order to avoid this singular ordinance, only SRO owners, no other property owners, must buy freedom either at $45,000 a unit or build alternative units at their own expense and turn those new units over, with no payment, to the municipality's designees. Otherwise, those SRO owners who "qualify" can obtain their freedom only upon proving that the owner is not earning a "sufficient" rate of return (*i.e.*, an artificially low rate of return on an artificially low assessed value of the property). In that event, the "buy-out" price *under certain circumstances* (not yet the subject of municipal regulations), *may be* reduced at the discretion of the City.

The foregoing insufficiency of relationship between the incidence of the burdens created by Local Law No. 9 with the

[10] At pages 436-37 of the Supplemental Record, the attorneys for the intervenors in this case (here represented by the Coalition and MFY petitions) acknowledged that the rents to be charged for SRO units to occupants who as a consequence of Local Law No. 9 take possession thereof, although regulated, may still be too high for the homeless to pay. Consequently, the only effect Local Law No. 9 may have is to furnish housing to the middle class. Notwithstanding, the attorney justified the ordinance on the "trickle down" theory that if young middle class citizens were tempted to move into SRO units (ignoring the lack of bathrooms and kitchens), New York City's housing crisis might be eased and the impoverished move into what were the units occupied by those younger middle class individuals.

creation of the problem allegedly to be solved and the means to solve it, makes the Local Law a "taking" under *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), as the Court of Appeals so found. *Seawall Associates* v. *City of New York*, 74 N.Y.2d at 106, 111, 112, 544 N.Y.S.2d at 548, 551, 552, 542 N.E.2d at 1065, 1068, 1069. Proposed destruction by Local Law No. 9 of two particular strands in the bundle of rights which constitute "property" under New York law—the right to be free of strangers and the right to develop—dictate the finding that Local Law No. 9 is an unjustified "taking" as described in *Hodel* v. *Irving*, 481 U.S. 704 (1987) and *Loretto* v. *Teleprompter, Manhattan Cable TV*, 458 U.S. 419 (1982), as also found by the Court of Appeals. *Seawall Associates v. City of New York*, 74 N.Y.2d at 102, 103, 104, 105, 106, 544 N.Y.S.2d at 546, 547, 548, 542 N.E.2d at 1062, 1063, 1064, 1065.[11]

Finally, the basic unfairness of placing such a burden on a discrete class of owners, prohibiting them (in the absence of payment of ransom of huge proportions) from using their properties in any way *but the one way the municipal government directs*, violates the balancing approach set forth in *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978), as also stated by the Court of Appeals. *Seawall Associates v. City of New York*, 74 N.Y.2d at 108, 111, 112, 544 N.Y.S.2d at 549, 551, 552, 542 N.E.2d at 1066, 1068, 1070. Nor can it be seriously believed that this ordinance is a mere regulation of prices or other economic incidents of rental accommodations, as was accepted in *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988), and as argued in the petitions.

[11] The Coalition petition at pages 22-24 makes the peculiar argument that governmental destruction of the right of property owners to exclude others is a "taking" only if "personal privacy" is involved. It thus claims that such a "right" does not exist in favor of commercial owners, landlords and developers. Unaccountably, the Coalition petition cites *Kaiser-Aetna* v. *United States*, 444 U.S. 164 (1979), as authority for that position, overlooking the status of the owner in that case as a developer who successfully complained that its right to exclude the public from its development was being infringed.

Nothing in *Pennell* (or any other case cited by petitioners) even implies that the owners of properties can be so conscripted into such a business with no avenue of escape other than to buy themselves out or abandon their properties.

In short and in conclusion, the New York Court of Appeals has not misapplied any principles or authorities; its decision is one which this Court would, in any event, affirm. It is on this most fundamental level that we oppose the granting of certiorari in this matter. The result reached by the Court of Appeals was the correct result, one which should not be, and which we are confident will not be, disturbed by this Court.

CONCLUSION

The three petitions for certiorari should be denied.

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Respectfully submitted,

PHILIP H. SCHAEFFER
Counsel of Record
WHITE & CASE
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8200

JANE D. CONNOLLY
JOHN S. WILLEMS
Of Counsel